In The
SUPREME COURT OF THE UNITED STATES

October Term, 1951

Washington, D. C.

HARRY BRIGGS, JR., ET AL.,

Appellants,

v.

R. W. ELLIOTT, CHAIRMAN, J. D. CARSON, ET AL., MEMBERS OF BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 22, CLARENDON COUNTY, S. C., ET AL.

Appellees.

No. 1

December 9, 10, 1952

WARD & PAUL

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HARRY BRIGGS, JR., et al., Appellants, vs. R. W. ELLIOTT, CHAIRMAN, J. D. CARSON, et al., MEMBERS OF BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 22, CLARENDON COUNTY, S. C., et al Appellees.	No. 101

Washington, D. C.

Tuesday, December 9, 1952.

The above-entitled cause came on for oral argument at 3:15 p.m.

PRESENT:

The Chief Justice, Honorable Fred M. Vinson, and Associate Justices Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton.

APPEARANCES:

On behalf of the Appellants:

THURGOOD MARSHALL, ESQ.

On behalf of Appellees:

JOHN W. DAVIS, ESQ.

P R O C E E D I N G S

The Chief Justice: Case No. 101, Harry Briggs, Jr., et al., against Roger W. Elliott, Chairman, J. D. Carson, et al., Members of Board of Trustees of School District No. 22, Clarendon County, South Carolina, et al.

The Clerk: Counsel are present.

ARGUMENT ON BEHALF OF APPELLANTS

By Mr. Marshall

Mr. Marshall: May it please the Court, this case is here on direct appeal from the United States District Court for the Eastern District of South Carolina. The issue raised in this case was clearly raised in the pleadings, and was clearly raised throughout the first hearing. After the first hearing, on appeal to this Court, it was raised prior to the second hearing. It was raised on motion for judgment, and there can be no question that from the beginning of this case, the filing of the initial complaint, up until the present time, the appellants have raised and have preserved their attack on the validity of the provision of the South Carolina Constitution and the South Carolina statute.

The specific provision of the South Carolina Code is set forth in our brief at page 10, and it appears in appellees' brief at page 14, and reads as follows:

"It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees

for persons of another race."

That is the Code provision.

The constitutional provision is, again, on page 10 of our brief, and is:

> "Separate schools shall be provided for children of the white and colored races" -- this is significant language -- "and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Those are the two provisions of the law of the State of South Carolina under attack in this particular case.

At the first hearing, before the trial got under way, counsel for the appellees, in open court, read a statement in which he admitted that although prior to that time they had decided that the physical facilities of the separate schools were equal, they had concluded finally that they were not equal, and they admitted in open court that they did not have equality, and at the suggestion of senior Judge Parker, this was made as an amendment to the answer, and the question as to physical facilities from that stage on was not in dispute.

At that time, counsel for the appellants, however, made the position clear that the attack was not being made on the "separate but equal" basis as to physical facilities, but the position we were taking was that these statutes were unconstitutional in their enforcement because they not only produced

these inevitable inequalities in physical facilities, but that evidence would be produced by expert witnesses to show that the governmentally-imposed racial segregation in and of itself was also a denial of equality.

I want to point out that our position is not that we are denied equality in these cases. I think there has been a considerable misunderstanding on that point. We are saying that there is a denial of equal protection of the laws, the legal phraseology of the clause in the Fourteenth Amendment, and not just this point as to equality, and I say that because I think most of the cases in the past have gone off on the point of whether or not you have substantial equality. It is a type of provision that, we think, tends to get us into trouble.

So pursuing that line, we produced expert witnesses, who had surveyed the school situation to show the full extent of the physical inequalities, and then we produced expert witnesses. Appellees in their brief comment that they do not think too much of them. I do not think that the District Court thought too much of them. But they stand in the record as unchallenged as experts in their field, and I think we have arrived at the stage where the courts do give credence to the testimony of people who are experts in their fields.

On the question that was raised a minute ago in the other case about whether or not there is any relevancy to this classification on a racial basis or not, in the case of the

case of the testimony of Dr. Robert Redfield -- I am sure the Court will remember his testimony in the Sweatt case -- the District Court was unwilling to carry the case over an extra day. Dr. Redfield was stuck with the usual air travel from one city to another. And by agreement of counsel and with approval of the court, we placed into the record Dr. Redfield's testimony.

If you will remember, Dr. Redfield's testimony was to this effect, that there were no recognizable differences from a racial standpoint between children, and that if there could be such a difference that would be recognizable and connected with education, it would be so insignificant as to be unworthy of anybody's consideration.

In substance, he said, on page 161 of the record -- I think it is page 161 -- that given a similar learning situation, a Negro child and a white child would tend to do about the same thing. I think I have it here. It is on page 161:

"Question: As a result of your studies that you have made, the training that you have had in your specialized field over some 20 years, given a similar learning situation, what, if any differences, is there between the accomplishment of a white and a Negro student, given a similar learning situation?

"Answer: I understand, if I may say so, a similar learning situation to include a similar

degree of preparation?

"Question: Yes.

"Answer: Then I would say that my conclusion is that the one does as well as the other on the average."

He has considerable testimony along the lines. But we produced testimony to show what we considered to be the normal tack on a classification statute, that this Court has laid down the rule in many cases set out in our brief, that in the case of the object or person being classified, it must be shown that there is a difference in the two, and, too, that the state must show that that difference has a significance with the subject matter being legislated, and the state has made no effort up to this date to show any basis for that classification other than that it would be unwise to do otherwise.

Witnesses testified that segregation deterred the development of the personalities of these children. Two witnesses testified that it deprives them of equal status in the school community, that it destroys their self-respect. Two other witnesses testified that it denies them full opportunity for democratic social development. Another witness said that it stamps him with a badge of inferiority.

The summation of that testimony is that the Negro children have road blocks put up in their minds as a result of this segregation, so that the amount of education that they take in

is much less than other students take in.

The other significant point in this case is that one witness, Dr. Kenneth Clark, examined the appellants in this very case and found that they were injured as a result of this segregation. The court completely disregarded that.

I do not know what clearer testimony we could produce in an attack on a specific statute as applied to a specific group of appellants.

The only evidence produced by the appellees in this case was one witness who testified as to, in general, the running of the school system and the difference between rural schools and consolidated schools, which had no basis whatsoever on the constitutional question.

Another witness, E. R. Crow, was produced to testify as to the new bond issue that was to go into effect after the hearing this case, at which time they would build more schools as a result of that money. That testimony was admitted into the record over objection of the appellants. The appellants took the position that anything that was to be talked about in the future was irrelevant to a constitutional issue where a personal and present right was asserted. However, the court overruled the objection. Mr. Crow testified.

Then he was asked as to whether or not it would not be "unwise" to break down segregation in South Carolina. Then Mr. Crow proceeded to testify as an expert. He had six years of

experience, I think, as superintendent of schools, and prior to that time he was principal of a high school in Columbia. He testified that it would be unwise. He also testified that he did not know but what the legislature would not appropriate the money.

On cross-examination he was asked as to whether or not he meant by the first statement that if relief was granted as prayed, the appellees might not conform to the relief, and Judge Parker made a very significant statement which appears in the record, that if we issue an order in this case, it will be obeyed, and I do not think there is any question about it.

On this second question on examination, when he was asked, who did he use as the basis for his information that this thing would not work in the South, he said he talked to gangs of people, white and colored, and he was giving the sum total of their testimony, or rather their statements to him. And again on cross-examination he was asked to name at least one of the Negroes he talked to, and he could not call the name of a single Negro he had ever talked to. I think the basis of his testimony on that point should be weighed by that statement on cross-examination.

He also said that there was a difference between what happened in northern states, where segregation is broken down, and what would happen in the southern states, because they had a larger number of Negroes in the South, and they had a larger

problem because the percentage of Negroes was so high. And again on cross-examination, he was asked the specific question: "Well, assuming that in South Carolina the population was 95 per cent white and 5 per cent colored, would you answer be any different? And he said, No, he would make the same answer regardless.

That is the only evidence in the record for the appellees here. They wanted to put on the speech of Professor Odom, and they were refused the right to put the speech in, because, after all, Professor Odom was right across, in North Carolina, and could have been called as a witness.

So here we have a record that has made no effort whatsoever -- no effort whatsoever -- to support the legislative determinations of the State of South Carolina. And this Court is being asked to uphold those statutes, the statute and the constitutional provision because of two reasons. One is that these matters are legislative matters, as to whether or not we are going to have segregation. For example, the majority of the court in the first hearing said, speaking of equality under the Fourteenth Amendment, "How this shall be done is a matter for the school authorities and not for the court, so long as it is done in good faith and equality of facilities is offered."

Again the court said, in Chief Judge Parker's opinion:

"We think, however, that segregation of the races in the public schools, so long as equality of

rights is preserved, is a matter of legislative policy for the several states, with which the Federal courts are powerless to interfere."

So here we have the unique situation of an asserted Federal right which has been declared several times by this Court to be personal and present, being set aside on the theory that it is a matter for the state legislature to decide, and it is not for this Court. And that is directly contrary to every opinion of this Court.

In each instance where these matters come up in what, if I say "sensitive" field, or whatever I am talking about, civil rights, freedom of speech, et cetera -- at all times they have this position. The majority of the people wanted the statute; that is how it was passed.

There are always respectable people who can be quoted as in support of a statute. But in each case, this Court has made its own independent determination as to whether that statute is valid. Yet in this case, the Court is urged to give blanket approval that this field of segregation, and if I may say, this field of racial segregation, is purely to be left to the states, the direct opposite of what the Fourteenth Amendment was passed for, the direct opposite of the intent of the Fourteenth Amendment and the framers of it.

On this question of the sensitiveness of this field, and to leave it to the legislature, I know lawyers at times have a

hard time finding a case in point. But in the reply brief, I think that we have a case in point that is persuasive to this Court. It is the case of Elkinson v. Deliesseline, a decision by Mr. Justice William Johnson, appointed to this Court, if I remember, from South Carolina. The decision was rendered in 1823. And in 1823, Mr. Justice Johnson, in a case involving the statute of South Carolina, which provided that where free Negroes came in on a ship into Charleston, they had to put them in jail as long as the ship was there and then put them back on the ship -- and it was argued by people arguing for the statute that this was necessary, it was necessary to protect the people of South Carolina, and the majority must have wanted it and it was adopted -- Mr. Justice Johnson made an answer to that argument in 1823, which I think is pretty good law even of today. Mr. Justice Johnson said:

> "But to all this the plea of necessity is urged; and of the existence of that necessity we are told the state alone is to judge. Where is this to land us? Is it not asserting the right in each state to throw off the Federal Constitution and its will and pleasure? If it can be done as to any particular article it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand."

There is a lot of other language and other opinions, but I think that this is very significant.

The Chief Justice: Mr. Marshall, what emphasis to you give to the words, "So long as equality of rights is preserved"?

Mr. Marshall: In Judge Parker's opinion.

The Chief Justice: Yes.

Mr. Marshall: Of physical facilities, because he ends up in this statement, and make it, I think, very clear. On the second hearing, on three or four occasions, he made it clear that segregation was not involved in the case any longer.

Justice Reed: Segregation or equality of rights?

Mr. Marshall: He said that segregation was out of the case, and that we had disposed of it. And page 279 -- I think I marked it -- yes, sir, the question was asked of me about building the schools over night, and down near the end of the page it mentions the fact of segregation:

"Well, I understand you do not admit that any conditions exist that require segregation. I understand that.

"MR. MARSHALL: Yes, sir, that is right.

"JUDGE PARKER: But that has been ruled on by the Court. What we are considering now is the question whether the physical facilities, curricula --"

The Chief Justice: (Interposing) -- "and the other things that can be made equal, without the segregation issue, are being made equal?"

Mr. Marshall: He is talking about physical facilities.

The Chief Justice: He is also talking about the curricula, "and the other things that can be made equal."

Mr. Marshall: I am sorry I mentioned that, sir. I considered curricula in the physical facilities.

The Chief Justice: That is a shorthanded question.

Mr. Marshall: Yes, sir. But again on page 281, they asked the question of whether something can be done, and I said that they could break down segregation. Judge Dobie said, "Let that alone."

Judge Parker said, "That is the same question."

So I think for all intents and purposes, the District Court ruled out the question of all of this argument that segregation had the effect on these children to deny the children their rights under the Constitution, and they passed upon curricula, transportation, faculty and schools. At the second hearing, the report showed that they were making progress. The schools still were not equal. But the question was that if they proceeded the way they were as of March of last year, they would be equal as of the September just past.

But in this case in the trial we conceived ourselves as conforming to the rule set out in the McLaurin and the Sweatt cases, where this Court held that the only question to be decided was the question as to whether or not the action of the state in maintaining its segregation was denying to the students the equal protection of the laws.

Of course, those decisions were limited to the graduate and professional schools. But we took the position that the rationale, if you please, or the principle, to be stronger, set out in those cases would apply just as well down the line provided evidence could be introduced which would show the same type of injury.

That is the type of evidence we produced, and we believed that on the basis of that testimony, the District Court should properly have held that in the area of elementary and high schools, the same type of injury was present as would be present in the McLaurin or the Sweatt case.

However, the District Court held just to the contrary, and said that there was a significant difference between the two. That is, in the Sweatt case it was a matter of inequality, and in the McLaurin case, McLaurin was subject to such humiliation, et cetera, that nobody should put up with it, whereas in this case, we have positive testimony from Dr. Clark that the humiliation that these children have been going through is the type of injury to the minds that will be permanent as long as they are in segregated schools, not theoretical injury, but actual injury.

We believe that on the basis of that, on that narrow point of Sweatt and McLaurin -- on that I say, sir, that we do not have to get to Plessy v. Ferguson; we do not have to get to any other case, if we lean right on these two cases -- we believe

that there is a broader issue involved in these two cases, and despite the body of the law, Plessy v. Ferguson, Gong Lum v. Rice, the statement of Chief Justice Hughes in the Gaines case, some of the language in the Cumming case, even though not applicable as to here -- we also believe that there is another body of law, and that is the body of law on the Fifth Amendment cases, on the Japanese exclusion cases, and the Fourth Amendment case, language that was in Nixon v. Herndon, where Mr. Justice Holmes said that the states can do a lot of classifying that nobody can see any reason for, but certainly it can not go contrary to the Fourteenth Amendment; then the language in the Skinner case, the language of Mr. Justice Jackson in his concurring opinion in the Edwards case.

So on both the Fourteenth Amendment and the Fifteenth Amendment, this Court has repeatedly said that these distinctions on a racial basis or on a basis of ancestry are odious and invidious, and those decisions, I think, are entitled to just as much weight as Plessy v. Ferguson or Gong Lum v. Rice.

The Chief Justice. Mr. Marshall, in Plessy v. Ferguson, in the Harlan dissent --

Mr. Marshall: Yes, sir.

The Chief Justice: Do you attach any significance when he is dealing with illustrations of the absence of education?

Mr. Marshall: Yes, sir. I do not know, sir. I tried to study his opinions all along. But I think that he was trying to

take the position of the narrow issue involved in this case, and not touch on schools, because of the fact that at that time -- and this is pure speculation -- at that time the public school system was in such bad shape, when people were fighting compulsory attendance laws, they were fighting the money to be put in schools, and it was in a state of flux, but on the other hand, in the majority opinion, the significant thing, the case that they relied on, was the Roberts case, which was decided before the Fourteenth Amendment was even passed.

Justice Frankfurter: But that does not do away with a consideration of the Roberts case, does it?

Mr. Marshall: No, sir, it does not.

Justice Frankfurter: The significance of the Roberts case is that that should be considered by the Supreme Court at a time when that issue was rampant in the United States.

Mr. Marshall: Well, sir, I do not know about those days. But I can not conceive of the Roberts case being good for anything except that the legislatures of the states at those times were trying to work out their problems as they best could understand. And it could be that up in Massachusetts at that time they thought that Negroes -- some of them were escaping from slavery, and all -- but I still say that the considerations for the passage of any legislation before the Civil War and up to 1900, certainly, could not apply at the present time. I think that every race has made progress, but I do not believe

that those considerations have any bearing at this time. The question today is --

Justice Frankfurter: They do not study these cases. But may I call your attention to what Mr. Justice Holmes said about the Fourteenth Amendment?

"The Fourteenth Amendment itself as an historical product did not destroy history for the state and substitute mechanical departments of law . . ."

Mr. Marshall: I agree, sir.

Justice Frankfurter: Then you have to face the fact that this is not a question to be decided by an abstract starting point of natural law, that you cannot have segregation. If we start with that, of course, we will end with that.

Mr. Marshall: I do not know of any other proposition, sir, that we could consider that would say that because a person who is as white as snow with blue eyes and blond hair has to be set aside.

Justice Frankfurter: Do you think that is the case?

Mr. Marshall: Yes, sir. The law of South Carolina applies that way.

Justice Frankfurter: Do you think that this law was passed for the same reason that a law would be passed prohibiting blue-eyed children from attending public schools? You would permit all blue-eyed children to go to separate schools? You think that this is the case?

Mr. Marshall: No, sir, because the blue-eyed people in the United States never had the badge of slavery which was perpetuated in the statutes.

Justice Frankfurter: If it is perpetuated as slavery, then the Thirteenth Amendment would apply.

Mr. Marshall: But at the time --

Justice Frankfurter: Do you really think it helps us not to recognize that behind this are certain facts of life, and the question is whether a legislature can address itself to those facts of life in despite of or within the Fourteenth Amendment, or whether, whatever the facts of life might be, where there is a vast congregation of Negro population as against the states where there is not, whether that is an irrelevant consideration? Can you escape facing those sociological facts, Mr. Marshall?

Mr. Marshall: No, I cannot escape it. But if I did fail to escape it, I would have to throw completely aside the personal and present rights of those individuals.

Justice Frankfurter: No, you would not. It does not follow because you cannot make certain classifications, you cannot make some classifications.

Mr. Marshall: But the personal and present right that I have to be considered like any other citizen of Clarendon County, South Carolina, is a right that has been recognized by this Court over and over again. And so far as the appellants in

this case are concerned, I cannot consider it sufficient to be relegated to the legislature of South Carolina where the record in this Court shows their consideration of Negroes, and I speak specifically of the primary cases.

Justice Frankfurter: If you would refer to the record of the case, there they said that the doctrine of classification is not excluded by the Fourteenth Amendment, but its employment by state legislatures has no justifiable foundation.

Mr. Marshall: I think that when an attack is made on a statute on the ground that it is an unreasonable classification, and competent, recognized testimony is produced, I think then the least that the state has to do is to produce something to defend their statutes.

Justice Frankfurter: I follow you when you talk that way.

Mr. Marshall: That is part of the argument, sir.

Justice Frankfurter: But when you start, as I say, with the conclusion that you cannot have segregation, then there is no problem. If you start with the conclusion of a problem, there is no problem.

Mr. Marshall: But Mr. Justice Frankfurter, I was trying to make three different points. I said that the first one was peculiarly narrow, under the McLaurin and the Sweatt decisions.

The second point was that on a classification basis, these statutes were bad.

The third point was the broader point, that racial dis-

tinctions in and of themselves are invidious. I consider it as a three-pronged attack. Any one of the three would be sufficient for reversal.

Justice Frankfurter: You may recall that this Court not so many years ago decided that the legislature of Louisiana could restrict the calling of pilots on the Mississippi to the question of who your father was.

Mr. Marshall: Yes, sir.

Justice Frankfurter: And there were those of us who sustained that legislation, not because we thought it was admirable or because we thought it comported with human notions or because we believed in primogeniture, but for different reasons, that it was so imbedded in the cnflict of the history of that problem in Louisiana that we thought on the whole that was an allowable justification.

Mr. Marshall: I say, sir, that I do not think --

Justice Frankfurter: I am not taking that beside this case. I am not meaning to intimate any of that, as you well know, on this subject. I am just saying how the subjects are to be dealt with.

Mr. Marshall: But Mr. Justice Frankfurter, I do not think that segregation in public schools is any more ingrained in the South than segregation in transportation, and this Court upset it in the Morgan case. I do not think it is any more ingrained.

Justice Frankfurter: It upset it in the Morgan case on

the ground that it was none of the business of the state; it was an interstate problem.

Mr. Marshall: That is a different problem. But a minute ago the very question was raised that we have to deal with realities, and it did upset that. Take the primary case. There is no more ingrained rule than there were in the cases of McLaurin and Sweatt, the graduate school cases.

Justice Frankfurter: I am willing to suggest that this problem is more complicated than the simple recognition of a absolute non possumus.

Mr. Marshall: I agree that it is not only complicated. I agree that it is a tough problem. But I think that it is a problem that has to be faced.

Justice Frankfurter: That is why we are here.

Mr. Marshall: That is what I appreciate, Your Honor. But I say, sir, that most of my time is spent down in the South, and despite all these predictions as to what might happen, I do not think that anything is going to happen any more except on the graduate and professional level. And this Court can take notice of the reports that have been in papers such as the New York Times. But it seems to me on that question, this Court should go back to the case of Buchanan v. Warley, where on the question as to whether or not there was this great problem, this Court in Buchanan v. Warley said:

"That there exists a serious and difficult

problem arising from a feeling of race hostility which the law is powerless to control, and for which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges."

In this case, granting that there is a feeling of race hostility in South Carolina, if there be such a thing, or granting that there is that problem, that we cannot have the individual rights subjected to this consideration of what the groups might do, for example, it was even argued that it will be better for both the Negro and the so-called white group. This record is not quite clear as to who is in the white group, because the superintendent of schools said that he did not know; all he knew was that Negroes were excluded. So I imagine that the other schools take in everybody.

So it seems to me that insofar as this case is concerned, whereas in the Kansas case there was a finding of fact that was favorable to the appellants -- in this case the opinion of the court mentions the fact that the findings are embodied in the opinion, and the court in that case decided that the only issue would be these facilities, the curriculum, transportation, et cetera.

In the brief for the appellees in this case and the argument in the lower court, I have yet to hear any one say that they

denied that these children are harmed by reason of this segregation. Nobody denies that, at least up to now. So there is a grant, I should assume, that segregation in and of itself harms these children.

Now, the argument is made that because we are drawn into a broader problem down in South Carolina, because of a situation down there, that this statute should be upheld.

So there we have a direct cleavage from one side to the other side. I do not think any of that is significant. As a matter of fact, I think all of that argument is made without foundation. I do not believe that in the case of the sworn testimony of the witnesses, statements and briefs and quotations from magazine articles will counteract what is actually in the brief.

So what do we have in the record? We have testimony of physical inequality. It is admitted. We have the testimony of experts as to the exact harm which is inherent in segregation wherever it occurs. That I would assume is too broad for the immediate decision, because after all, the only point before this Court is the statute as it was applied in Clarendon County. But if this Court would reverse and the case would be sent back, we are not asking for affirmative relief. That will not put anybody in any school. The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district

people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on.

Justice Frankfurter: You mean, if we reverse, it will not entitle every mother to have her child go to a non-segregated school in Clarendon County?

Mr. Marshall: No, sir.

Justice Frankfurter: What will it do? Would you mind spelling this out? What would happen?

Mr. Marshall: Yes, sir. The school board, I assume, would find some other method of distributing the children, a recognizable method, by drawing district lines.

Justice Frankfurter: What would that mean?

Mr. Marshall: The usual procedure --

Justice Frankfurter: You mean that geographically the colored people all live in one district?

Mr. Marshall: No, sir, they do not. They are mixed up somewhat.

Justice Frankfurter: Then why would not the children be mixed?

Mr. Marshall: If they are in the district, they would be. But there might possibly be areas --

Justice Frankfurter: You mean we would have gerrymandering of school districts?

Mr. Marshall: Not gerrymandering, sir. The lines could be equal.

Justice Frankfurter: I think that nothing would be worse than for this Court -- I am expressing my own opinion -- nothing would be worse, from my point of view, than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks?

Mr. Marshall: No, sir. As a matter of fact, sir, we have had cases where we have taken care of that. But the point is that it is my assumption that where this is done, it will work out, if I might leave the record, by statute in some states.

Justice Frankfurter: It would be more important information, in my mind, to have you spell out in concrete what would happen if this Court reverses and the case goes back to the District Court for the entry of a decree.

Mr. Marshall: I think, sir, that the decree would be entered which would enjoin the school officials from, one, enforcing the statute; two, from segregating on the basis of race or color. Then I think what ever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.

For example, the colored child that is over here in this school would not be able to go to that school. But the only thing that would come down would be the decision that whatever

rule you set in, if you set in, it shall not be on race, either actually or by any other way. It would violate the injunction, in my opinion.

Justice Frankfurter: There is a thing that I do not understand. Why would not that inevitably involve -- unless you have Negro ghettoes, or if you find that language offensive, unless you have concentrations of Negroes, so that only Negro children would go there, and there would be no white children mixed with them, or vice versa -- why would it not involve Negro children saying, "I want to go to this school instead of that school"?

Mr. Marshall: That is the interesting thing in this procedure. They could move over into that district, if necessary. Even if you get stuck in one district, there is always an out, as long as this statute is gone.

There are several ways that can be done. But we have instances, if I might, sir, where they have been able to draw a line and to enclose -- this is in the North -- to enclose the Negroes, and in New York those lines have on every occasion been declared unreasonably drawn, because it is obvious that they were drawn for that purpose.

Justice Frankfurter: Gerrymandering?

Mr. Marshall: Yes, sir. As a matter of fact, they used the word "gerrymander".

So in South Carolina, if the decree was entered as we have

requested, then the school district would have to decide a means other than race, and if it ended up that the Negroes were all in one school, because of race, they would be violating the injunction just as bad as they are by violating what we consider to be the Fourteenth Amendment now.

Justice Frankfurter: Now, I think it is important to know, before one starts, where he is going. As to available schools, how would that cut across this problem? If everything was done that you wanted done, would there be physical facilities within such drawing of lines as you would regard as not evasive of the decree?

Mr. Marshall: Most of the school buildings are now assigned to Negroes, so that the Negro buildings are scattered around in that county. Now, as to whether or not lines could be properly drawn, I say quite frankly, sir, I do not know. But I do know that in most of the southern areas -- it might be news to the Court -- there are very few areas that are predominatly one race or the other.

Justice Frankfurter: Are you going to argue the District of Columbia case?

Mr. Marshall: No, sir.

If you have any questions, I would try, but I cannot bind the other side.

Justice Frankfurter: I just wondered, in regard to this question that we are discussing, how what you are indicating

or contemplating would work out in the District if tomorrow there were the requirement that there must be mixed groups.

Mr. Marshall: Most of the schools in the District of Columbia would be integrated. There might possibly be some in the concentrated areas up in the northwest section. There might be. But I doubt it. But I think the question as to what would happen if such decree was entered -- I again point out that it is actually a matter that is for the school authorities to decide, and it is not a matter for us, it seems to me, as lawyers, to recommend except where there is racial discrimination or discrimination on one side or the other.

But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children. And the testimony in many instances is along that line.

So in South Carolina, if the District Court issued a decree -- and I hasten to add that in the second hearing when we were prevented from arguing segregation, the argument was made that on the basis of the fact that the schools were still unequal, we should get relief on the basis of the Sipuel decision -- the court said in that case, no, that the only relief we could get would be this relief as of September, and in that case the court took the position that it would be impossible to break into the middle of the year. If I might anticipate a question on that, the point would come up as to, if a decree in this case

(8) should happen to be issued by the District Court, or in a case similar to this, as to whether or not there would be a time given for the actual enrollment of the children, et cetera, and changing of children from school to school. It would be my position in a case like that, which is very much in answer to the brief filed by the United States in this case -- it would be my position that the important thing is to get the principle established, and if a decree were entered saying that facilities are declared to be unequal and that the appellants are entitled to an injunction, and then the District Court issues the injunction, it would seem to me that it would go without saying that the local school board had the time to do it. But obviously it could not do it over night, and it might take six months to do it one place and two months to do it another place.

Again, I say it is not a matter for judicial determination. That would be a matter for legislative determination.

I would like to save my fifteen minutes for rebuttal.

Justice Jackson: Coming back to the question that Justice Black asked you, could I ask you what, if any, effect does your argument have on the Indian policy, the segregation of the Indians. How do you deal with that?

Mr. Marshall: I think that again that we are are in a position of having grown up. Indians are no longer wards of the Government. I do not think that they stand in any special category. And in all of the southern states that I know of, the

Indians are in a preferred position so far as Negroes are concerned, and I do not know of any place where they are excluded.

Justice Jackson: In some respects, in taxes, at least, I wish I could claim to have a little Indian blood.

Mr. Marshall: But the only time it ever came up was in the --

Justice Jackson: But on the historical argument, the philosophy of the Fourteenth Amendment which you contended for does not seem to have been applied by the people who adopted the Fourteenth Amendment, at least in the Indian case.

Mr. Marshall: I think, sir, that if we go back even as far as Slaughter-House and come up through Strauder, where the Fourteenth Amendment was passed for the specific purpose of raising the newly-freed slaves up, et cetera, I do not know.

Justice Jackson: Do you think that might not apply to the Indians?

Mr. Marshall: I think it would. But I think that the biggest trouble with the Indians is that they just have not had the judgment or the wherewithal to bring lawsuits.

Justice Jackson: Maybe you should bring some up.

Mr. Marshall: I have a full load now, Mr. Justice.

The Chief Justice: Mr. Davis.

ARGUMENT ON BEHALF OF THE APPELLEES

By Mr. Davis

Mr. Davis: May it please the Court, I think if the appellants' construction of the Fourteenth Amendment should prevail here, there is no doubt in my mind that it would catch the Indian within its grasp just as much as the Negro. If it should prevail, I am unable to see why a state would have any further right to segregate its pupils on the ground of sex or on the ground of age or on the ground of mental capacity. If it may classify it for one purpose on the basis of admitted facts, it may, according to my contention, classify it for other.

Now, I want to address myself during the course of this argument to three propositions, and I will utilize the remaining minutes of the afternoon to state them.

The first thing which I want to contend for before the Court is that the mandate of the court below, which I quote, "Required the defendants to proceed at once to furnish plaintiffs and other Negro pupils of said district educational facilities, equipment, curricula, and opportunities equal to those furnished white pupils."

That mandate has been fully complied with. We have been found to have obeyed the court's injunction. The question is no longer in the case, and the complaint which is made by the

appellants in their brief that the school doors should have been immediately thrown open instead of taking the time necessary to readjust the physical facilities, is a moot question at this stage of the case.

The second question to which I wish to address myself is that Article XIV, Section 7, of the Constitution of South Carolina, and Section 5377 of the Code, both making the separation of schools between white and colored mandatory, do not offend the Fourteenth Amendment of the Constitution of the United States or deny equal protection.

The right of a state to classify the pupils in its public schools on the basis of sex or age or mental capacity, or race, is not impaired or affected by that amendment.

Third, I want to say something about the evidence offered by the plaintiffs upon which counsel so confidently relied.

I see that the evidence offered by the plaintiffs, be its merit what it may, deals entirely with legislative policy, and does not tread on constitutional right. Whether it does or not, it would be difficult for me to conceal my opinion that that evidence in and of itself is of slight weight and in conflict with the opinion of other and better informed sources.

I hope I have not laid out too much territory for the time that is allotted to me. Let me attack it seriatim.

I want to put this case in its proper frame, by reciting what has transpired up to this time, so that Your Honors may be

sure that my assertion of full performance is not an idle boast.

When the first hearing was at an end, the court entered its decree, demanding us to proceed forthwith to furnish, not merely physical facilities, as my friend would have it, but educational facilities, equipment, curricula, and opportunities equal on the part of the state for the Negro as for the white pupil.

Now, the court could have stopped there, and for the enforcement of its decree it could have awaited the moment when some complainant would have come in and invoked process of contempt against the delinquent defendants. That would have satisfied the duty of the chancellor. He would have retained in its own hand the powers of enforcement which the rules of equity give him, and perhaps his conscience might have been at rest with the feeling that he had done all that judicially he was called upon to do.

But the court below went further. In order to ensure the obedience to its decree, it required the defendants within the period of six months, not later than six months, to report what progress they were making in the execution of the court's order. The court might have said, "You must do this tomorrow." I gather from counsel that not even counsel for the appellants here contends so much.

Insofar as the equality, equalization required the building

of buildings and, of course, the court knew, as every sensible man knew, that you do not get buildings by rubbing an Aladdin's lamp, and you cannot create them by court decree. To say that, the day following this decree, all this should have been done would have been brutum fulmen, and no credit to the court or anybody else.

In December, within the allotted time, the defendants made report of progress. At that time, the case on Your Honors' docket. Because of the fact that an appeal had been taken from so much of the decree below, they refused to strike down the Constitution and the statute.

Thereupon, the District Court sent that report to you, and you, not desiring to pass upon it, remanded the case to the District Court, and called upon them to pass upon their report which had been made to them, and to free their hands entirely for such action as they might see fit. You vacated the order entered below.

The District Court thereupon resumed control of the case. It set it down for a hearing in March of 1952, at which time the defendants filed a supplemental report showing the progress up to that precise day and minute. Thereupon, the court declared that the defendants had made every possible effort to comply with the decree of the court, that they had done all that was humanly possible, and that by the month of September, 1952, equality between the races in this area would have been achieved.

So the record reads.

Now, I should just like briefly to summarize what the situation was that those reports exposed. They showed that in the State of South Carolina, under the leadership of its present Governor, there was a surge for educational reform and improvement, which I suspect has not been exceeded in any state in this Union. It began with the legislature which adopted the act providing for the issuance of a maximum of $75,000,000 in bonds for school purposes, not an ultimate of $75,000,000, but a maximum at any one time of $75,000,000, and that to be supported and serviced by a three per cent sales tax. Speaking from some slight personal experience, I can assert that it escapes very few transactions in that state.

That being done, the legislature set up an educational finance commission, with power to survey the educational system of the state, to consolidate districts for better finance, to allot funds to the districts all over the state in such manner as this commission might find to be appropriate. Thereupon, the commission goes to Clarendon County, which is the seat of the present drama. It finds that in Clarendon County there are 34 educational districts, so-called, each with its separate body of officers and administrators, and all of them bogged down, I take it, by similar proverty.

It directed that that county be readjusted, redistricted, into three districts, one, District No. 1 to contain the conten-

tious District No. 22, with which the litigation began, and six others. I gather that counsel wants to reverse that process. Having brought these districts into unity and strength, he has some plan, the mathematics of which I do not entirely grasp, by which the districts will be redistricted again with resulting benefit to all concerned.

District No. 1 was created. Its officers entered this litigation, and agreed to be bound by the decree, and are here present.

The first thing that the district did was to provide for the building of a new Negro high school at Scott's Branch, and for the repair of the secondary school at Scott's Branch, for which it expended the sum of $261,000 on a contract that they should be completed and put into use by September of 1952.

I speak outside the record, but that has been accomplished.

It was also provided that it should purchase the site for some two Negro secondary schools, which should be serviced by this fund.

$21,000 was appropriated immediately for additional equipment, and those secondary schools are now on the verge of completion.

But what could be done immediately -- and with this I shall close for the afternoon -- what could be done immediately by this school board was done. Salaries of teachers were equalized. Curricula were made uniform, and the State of South Carolina

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appropriated money to furnish school busses for black and white. Of course, in these days, the school boy no longer walks. The figure of the school boy trudging four miles in the morning and back four in the afternoon swinging his books as he went is as much a figure of myth as the presidential candidate born in a log cabin. Both of those characters have disappeared.

The Chief Justice: The Court will adjourn.

(Whereupon, at 4:30 p.m., the Court arose.)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952.

HARRY BRIGGS, JR., et al., Appellants, vs. R. W. ELLIOTT, CHAIRMAN, J. D. CARSON, et al., MEMBERS OF BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 22, CLARENDON COUNTY, S. C., et al Appellees.	No. 101

Washington, D. C.

Wednesday, December 10, 1952.

Oral argument in the above-entitled cause was resumed at 12:10 p.m.

PRESENT:

The Chief Justice, Honorable Fred M. Vinson, and Associate Justices Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton.

APPEARANCES:

On behalf of the Appellants:

THURGOOD MARSHALL, ESQ.

On behalf of Appellees:

JOHN W. DAVIS, ESQ.

PROCEEDINGS

The Chief Justice: Case No. 101, Harry Briggs, Jr., et al., against R. W. Elliott, Chairman, et al.

The Clerk: Counsel are present.

The Chief Justice: Proceed.

ARGUMENT ON BEHALF OF APPELLEES -- Resumed

By Mr. Davis

Mr. Davis: If the Court please, when the Court arose on yesterday, I was reciting the progress that had been made in the Public School System in South Carolina, and with particular reference to the improvement of the facilities, equipment, curricular, and opportunities accorded to the colored students.

I might go further on that subject, but I am content to read two sentences from the opinion of the court below. This is the opinion of Judge Parker:

> "The reports of December 21 and March 3 filed by defendants, which are admitted by plaintiffs to be true and correct and which are so found by the Court, show beyond question that defendants have proceeded promptly and in good faith to comply with the Court's decree."

They add:

> "There can be no doubt that as a result of the program in which defendants are engaged the educational facilities and opportunities afforded Negroes within

> the district will, by the beginning of the next school year beginning in September 1952, be made equal to those afforded white persons."

The only additional fact which I want to mention, aside from leaving the remainder to my brief of the opinion of the court below is a fact of which I think Mr. Marshall should take cognizance when he proceeds to his redistricting program, and that is the fact that in District No. 1, the district here in controversy, there are now, speaking of the report of last March, 2,799 registered Negro students and 295 registered white students. In other words, the proportion between the Negroes and the whites is about in the ratio of 10 to 1. And whether discrimination is to be abolished by introducing 2,800 Negro students in the schools now occupied by the whites, or conversely introducing 295 whites into the schools now occupied by 2,800 Negroes, the result in either event is one which one cannot contemplate with entire equanimity.

I come, then, to what is really the crux of the case. That is the meaning and interpretation of the Fourteenth Amendment to the Constitution of the United States. We devote to that important subject but five pages of our brief. We trust the Court will not treat that summary disposition of it as due to any lack of earnestness on our part.

We have endeavored to compress the outline of the argument for two reasons. The first is that the opinion of Judge Parker

rendered below is so cogent and complete that it seems impossible to add anything to his reasoning. The second is, perhaps more compelling at the moment, that your Honors have so often and so recently dealt withthis subject that it would be a work of supererogation to remind you of the cases in which you have dealt with it or to argue with you, the authors, the meaning and scope of the opinions you have emitted.

But if, as lawyers or judges, we have ascertained the scope and bearing of the equal protection clause of the Fourteenth Amendment, our duty is done. The rest must be left to those who dictate public policy, and not to courts.

How should we approach it? I use the language of the court:

> "An amendment to the Constitution should be read," you have said, "in a sense most obvious to the common understanding at the time of its adoption, for it was for public adoption that it was proposed."

Still earlier you have said:

> "It is the duty of the interpretation to place ourselves as nearly as possible in the condition of those who framed the instrument."

What was the condition of those who framed the instrument? The resolution proposing the Fourteenth Amendment was proffered by Congress in June, 1866. In the succeeding month of July, the same Congress proceeded to establish, or to continue separate schools in the District of Columbia, and from that good day to

this, Congress has not waivered in that policy. It has confronted the attack upon it repeatedly. During the life of Charles Sumner, over and over again, he undertook to amend the law of the District so as to provide for mixed and not for separate schools, and again and again he was defeated.

Justice Burton: What is your answer, Mr. Davis, to the suggestion mentioned yesterday that at that time the conditions and relations between the two races were such that what might have been unconstitutional then would not be unconstitutional now?

Mr. Davis: My answer to that is that changed conditions may affect policy, but changed conditions cannot broaden the terminology of the Constitution, the thought is an administrative or a political question, and not a judicial one.

Justice Burton: But the Constitution is a living document that must be interpreted in relation to the facts of the time in which it is interpreted. Did we not go through with that in connection with child labor cases, and so forth?

Mr. Davis: Oh, well, of course, changed conditions may bring things within the scope of the Constitution which were not originally contemplated, and of that perhaps the aptest illustration is the interstate commerce clause. Many things have been found to be interstate commerce which at the time of the writing of the Constitution were contemplated at all. Many of them did not even exist. But when they come within the field

of interstate commerce, then they become subject to congressional power, which is defined in the terms of the Constitution itself. So circumstances may bring new facts within the purview of the constitutional provision, but they do not alter, expand, or change the language that the framers of the Constitution have employed.

Justice Frankfurter: Mr. Davis, do you think that "equal" is a less fluid term than "commerce between the states"?

Mr. Davis: Less fluid?

Justice Frankfurter: Yes.

Mr. Davis: I have not compared the two on the point of fluidity.

Justice Frankfurter: Suppose you do it now.

Mr. Davis: I am not sure that I can approach it in just that sense.

Justice Frankfurter: The problem behind my question is whatever the phrasing of it would be.

Mr. Davis: That what is unequal today may be equal tomorrow, or vice versa?

Justice Frankfurter: That is it.

Mr. Davis: That might be. I should not philosophize about it. But the effort in which I am now engaged is to show how those who submitted this amendment and those who adopted it conceded it to be, and what their conduct by way of interpretation has been since its ratification in 1868.

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Justice Frankfurter: What you are saying is, that as a matter of history, history puts a gloss upon "equal" which does not permit elimination or admixture of white and colored in this aspect to be introduced?

Mr. Davis: Yes, I am saying that.

Justice Frankfurter: That is what you are saying?

Mr. Davis: Yes, I am saying that. I am saying that equal protection in the minds of the Congress of the United States did not contemplate mixed schools as a necessity. I am saying that, and I rest on it, though I shall not go further into the congressional history on this subject, because my brother Korman speaking for the District of Columbia will enter that phase of it.

It is true that in the Constitution of the United States there is no equal protection clause. It is true that the Fourteenth Amendment was addressed primarily to the states. But it is inconceivable that the Congress which submitted it would have forbidden the states to employ an educational scheme which Congress itself was persistent in employing in the District of Columbia.

I therefore urge that the action of Congress is a legislative interpretation of the meaning and scope of this amendment, and a legislative interpretation of a legislative act, no court, I respectfully submit is justified in ignoring.

What did the states think about this at the time of the

time of the ratification? At the time the the amendment was submitted, there were 37 states in the Union. Thirty of them had ratified the amendment at the time it was proclaimed in 1868. Of those 30 ratifying states, 23 either then had, or immediately installed separate schools for white and colored children under their public school systems. Were they violating the amendment which they had solemnly accepted? Were they conceiving of it in any other sense than that it did not touch their power over their public schools?

How do they stand today? Seventeen states in the Union today provide for separate schools for white and colored children, and four others make it permissive with their School Board. Those four are Wyoming, Kansas, of which we heard yesterday, New Mexico, and Arizona, so that you have 21 states today which conceive it their power and right to maintain separate schools if it suits their policy.

When we turn to the Judicial Branch, it has spoken on this question, perhaps with more repetition and in more cases than any other single separate constitutional question that now occurs to me. We have not larded our brief with quotations from the courts of last resort of the several states. It would be easy to do so, but we have assembled in our appendix a list of cases which the highest courts in the states have decided on this question. I am not sure that that list is exhaustive. In fact, I am inclined to think that it is not exhaustive. But certainly it

is impressive, and they speak with a single voice that their separate school system is not a violation of the Constitution of the United States.

What does this Court say? I repeat, I shall not undertake to interpret for your Honors the scope and weight of your own opinions. In Plessy v. Ferguson, Cumming v. Richmond County Board of Education, Gong Lum v. Rice, Maria College v. Kentucky, Sipuel v. Board of Regents, Gaines v. Canada, Sweatt v. Painter, and McLaurin v. Oklahoma, and there may be others, for all I know, certainly this Court has spoken in the most clear and unmistakable terms to the effect that this segregation is not unlawful. I am speaking for those with whom I am associated.

We find nothing in the latest cases that modifies that doctrine of "separate but equal" in the least. Sweatt v. Painter and similar cases were decided solely on the basis of inequality, as we think, and as we believe the Court intended.

It is a little late, said the court below, after this question has been presumed to be settled for 90 years -- it is a little late to argue that the question is still at large.

I want to read just one of Judge Parker's sentences on that. Said he:

> "It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States and great judges of high courts, have knowingly defied the Constitution for so long a

period or that they have acted in ignorance of the meaning of its provisions. Constitutional principle is the same now that it has been throughout this period, and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts.

"Members of the judiciary," it goes on to say, "have no more right to read their ideas of sociology into the Constitution than their ideas of economics."

It would be an interesting, though perhaps entirely useless, undertaking to enumerate the numbers of men charged with official duty in the legislative and the judicial branches of the Government who have declared that segregation is not per se unlawful. The Members of Congress, year after year, and session after session, the members of state constitutional conventions, the members of state legislatures, year after year and session after session, the members of the higher courts of the states, the members of the inferior criminal judiciary, and the members of this tribunal -- what their number may be, I do not know, but I think it reasonably certain that it must mount well into the thousands, and to this I stress for your Honors that every one of that vast group was bound by oath to support the Constitution of the United States and any of its amendments -- is it conceivable that all that body of concurrent opinion was recreant to its duty or misunderstood the constitutional mandate, or was

ignorant of the history which gave to the mandate its scope and meaning? I submit not.

Now, what are we told here that has made all that body of activity and learning of no consequence? Says counsel for the plaintiffs, or appellants, we have the uncontradicted testimony of expert witnesses that segregation is hurtful, and in their opinion hurtful to the children of both races, both colored and white. These witnesses severally described themselves as professors, associate professors, assistant professors, and one describes herself as a lecturer and adviser on curricular. I am not sure exactly what that means.

I did not impugn the sincerity of these learned gentlemen and lady. I am quite sure that they believe that they are expressing valid opinions on their subject. But there are two things notable about them. Not a one of them is under any official duty in the premises whatever; not a one of them has had to consider the welfare of the people for whom they are legislating or whose rights they were called on to adjudicate. And only one of them professes to have the slightest knowledge of conditions in the states where separate schools are now being maintained. Only one of them professes any knowledge of the condition within the 17 segregating states.

I want to refer just a moment to that particular witness, Dr. Clark. Dr. Clark professed to speak as an expert and an informed investigator on this subject. His investigation con-

sisted of visits to the Scott's Branch primary and secondary school, at Scott's Branch, which he undertook at the request of counsel for the plaintiffs. He called for the presentation to him of some 16 pupils between the ages of six and nine years, and he applied to them what he devised and what he was pleased to call an objective test. That consisted of offering to the 16 white and colored dolls, and inviting them to select the doll they would prefer, the doll they thought was nice, the doll that looked bad, or the doll that looked most like themselves. He ascertained that 10 out of his battery of 16 preferred the white doll. Nine thought the white doll was nice, and seven thought it looked most like themselves. Eleven said that the colored doll was bad, and one that the white doll was bad. And out of that intensive investigation and that application of that thoroughly scientific test, he deduced the sound conclusion that segregation there had produced confusion in the individuals -- I use his language -- "and their concepts about themselves conflicting in their personalities, that they have been definitely harmed in the development of their personalities."

That is a sad result, and we are invited to accept it as a scientific conclusion. But I am reminded of the scriptural saying, "Oh, that mine adversary had written a book." And Professor Clark, with the assistance of his wife, has written on this subject and has described a similar test which he submitted to colored pupils in the northern and non-segregated

schools. He found that 62 per cent of the colored children in the South chose a white doll; 72 per cent in the North chose the white doll; 52 per cent of the children in the South thought the white doll was nice; 68 per cent of the children in the North thought the white doll was nice; 49 per cent of the children in the South thought the colored doll was bad; 71 per cent of the children in the North thought the colored doll was bad.

Now, these latter scientific tests were conducted in non-segregating states, and with those results compared, what becomes of the blasting influence of segregation to which Dr. Clark so eloquently testifies?

The witness Trager, who is the lecturer and consultant on curricular, had never been in the South except when she visited her husband who was stationed at an Army post in Charleston during the war. And I gather that the visit was of somewhat brief character. She also was in search of scientific wisdom, and she submitted that same scientific test to a collection of children in the schools of Philadelphia, where segregation has been absent for many years. She made as a result of that what seems to have been surprising to her, the fact that in children from five to eight years of age, they were already aware, both white and colored, of racial differences between them.

Now, that may be a scientific conclusion. It would be rather surprising, if the children were possessed of their normal senses, if they were ignorant of some racial differences

between them, even at that early age.

I am tempted to digress, because I am discussing the weight and pith of this testimony, which is the reliance of the plaintiffs here to turn back this enormous weight of legislative and judicial precedent on this subject. I may have been unfortunate, or I may have been careless, but it seems to me that much of that which is handed around under the name of social science is an effort on the part of the scientist to rationalize his own preconceptions. They find usually, in my limited observation, what they go out to find.

One of these witnesses, Dr. Krech, speaks of a severed school, gives, as he says, "what we call in our lingo environmental support for the belief that Negroes are in some way different from and inferior to white people, and that in turn, of course, supports and strengthens beliefs of racial differences, of racial inferiority."

I ran across a sentence the other day which somebody said who was equally as expert as Dr. Krech in the "lingo" of the craft. He described much of the social science as "fragmentary expertise based on an examined presupposition," which is about as scientific language as you can use, I suppose, but seems to be entirely descriptive.

Now, South Carolina is unique among the states in one particular. You have often heard it said that an ounce of experience is worth a pound of theory. South Carolina does not

come to this policy as a stranger. She had mixed schools for 12 years, from 1865 to 1877. She had them as a result of the Constitutional Convention of 1865, which was led by a preacher of the Negro race, against whom I know nothing, who bore the somewhat distinguished name of Cardozo, and he forced through that convention the provision for mixed schools.

The then Governor of South Carolina, whose term was expiring, was the war governor, Governor Orr, who denounced the provision. He was succeeded by -- I hope the term has lost its invidiousness -- a carpetbagger from Maine, named Scott, and Scott denounced the provision. And Dr. Knight, the Professor of Education at the University of North Carolina, who has written on the subject, declares that it was the most unwise action of the period, and that that is a certainty.

When South Carolina moved from mixed to segregated schools, it did so in the light of experience, and in the light of the further fact, these authorities state, that it had been destructive to the public school system of South Carolina for 50 years after it was abolished.

Now, these learned witnesses do not have the whole field to themselves. They do not speak without contradiction from other sources. We quote in our brief -- I suppose it is not testimony, but it is quotable material, and we are content to adopt it -- Dr. Odum, of North Carolina, who is perhaps the foremost investigator of educational questions in the entire South; Dr. Frank

Graham, former president of the University of North Carolina; ex-Governor Darden, president of the University of Virginia; Hodding Carter, whose recent works on Southern conditions have become classic; Gunnar Myrdal, Swedish scientist employed to investigate the race question for the Rockefeller Foundation; W.E.B. DuBois; Ambrose Caliver; and the witness Crow, who testified in this case, all of them opposing the item that there should be an immediate abolition of segregated schools.

Let me read a sentence or two from Dr. DuBois. I may be wrong about this, but I should think that he has been perhaps the most constant and vocal opponent of Negro oppression of any of his race in the country. Says he:

> "It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their children to 'fight' this thing out, -- but, dear God, at what a cost!"

He goes on:

> "We shall get a finer, better balance of spirit;

an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated."

If this question is a judicial question, if it is to be decided on the varying opinions of scholars, students, writers, authorities, and what you will, certainly it cannot be said that the testimony will be all one way. Certainly it cannot be said that a legislature conducting its public schools in accordance with the wishes of its people -- it cannot be said that they are acting merely by caprice or by racial prejudice.

Says Judge Parker, again:

"The questions thus presented are not questions of constitutional right but of legislative policy, which must be formulated, not in vacuo or with doctrinaire disregard of existing conditions, but in realistic approach to the situations to which it is to be applied."

Once more, your Honors, I might say, What underlies this whole question? What is the great national and federal policy on this matter? Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not of all the activities of government the one which most nearly approaches the hearts and minds of people, the question of the education

of their young?

Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be ascertained before their children are forced into what may be an unwelcome contact?

I respectfully submit to the Court, there is no reason assigned here why this Court or any other should reverse the findings of 90 years.

The Chief Justice: Mr. Marshall.

REBUTTAL ARGUMENT ON BEHALF OF APPELLANTS

By Mr. Marshall

Mr. Marshall: May it please the Court, so far as the appellants are concerned in this case, at this point it seems to me that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the main stream of American life in these states.

There is nothing involved in this case other than race and color, and I do not need to go to the background of the statutes or anything else. I just read the statutes, and they say, "White and colored".

While we are talking about the feeling of the people in South Carolina, I think we must once again emphasize that under our form of government, these individual rights of minority

people are not to be left to even the most mature judgment of the majority of the people, and that the only testing ground as to whether or not individual rights are concerned is in this Court.

If I might digress just for a moment, on this question of the will of the people of South Carolina, if Ralph Bunch were assigned to South Carolina, his children would have to go to a Jim Crow school. No matter how great anyone becomes, if he happens to have been born a Negro, regardless of his color, he is relegated to that school.

Now, when we talk of the reasonableness of this legislation, the reasonsbleness, the reasonableness of the Constitution of South Carolina, and when we talk about the large body of judicial opinion in this case, I respectfully remind the Court that the exact same argument was made in the Sweatt case, and the brief in the Sweatt case contained, not only the same form, but the exact same type of appendix showing all the ramifications of the several decisions which had repeatedly upheld segregated education.

I also respectfully remind the Court that in the Sweatt case, as to the public policy of the State of Texas, they also filed a public opinion poll of Texas showing that by far the majority of the people of Texas at this late date wanted segregation.

I do not believe that that body of law has any more place

in this case than it had in the Sweatt case.

I think we should also point out in this regard that when we talk about reasonableness, what I think the appellees mean is reasonable insofar as the Legislature of South Carolina decided it to be reasonable, and reasonable insofar as the people of South Carolina. But what we are arguing in this case is as to whether or not it is reasonableness within the decided cases of this Court on the Fourteenth Amendment. As to this particular law involved in South Carolina, the constitutional provision and the statute -- the Constitution, I think, was in 1895 -- I do not know what this Court would have done if that statute had been brought before it at that time, but I am sure that this Court, regardless of its ultimate decision, would have tested the reasonableness of that classification, not by what the State of South Carolina wanted, but as to what the Fourteenth Amendment meant.

In the year 1952, when a statute is tested, it is not tested as to what is reasonable insofar as South Carolina is concerned; it must be tested as to what is reasonable as to this Court.

That is why we consider the case that Mr. Justice Johnson decided, cited in our reply brief, that even if this case had been tested back in those days, this Court would have felt a responsibility to weigh it against the applicable decisions of the Fourteenth Amendment, not on the question as to what is good

for South Carolina.

Insofar as the argument about the states having a right to classify students on the basis of sex, learning ability, et cetera, I do not know whether they do or not, but I do believe that if it could be shown that they were unreasonable, they would fall, too, that any of the actions of the state administrative officials that affect any classification must be tested by the regular rules set up by this Court.

So we in truth and in fact have what I consider to be the main issue in this case. They claim that our expert witnesses and all that we have produced are a legislative argument at best; that the witnesses were not too accurate, and were the run-of-the-mill scientific witnesses.

But I think if it is true that there is a large body of scientific evidence on the other side, the place to have produced that was in the District Court, and I do not believe that the State of South Carolina is unable to produce such witnesses for financial or other reasons.

Justice Frankfurter: Can we not take judicial notice of writings by people who competently deal with these problems? Can I not take judicial notice of Myrdal's book without having him called as a witness?

Mr. Marshall: Yes, sir. But I think when you take judicial notice of Gunnar Myrdal's book, we have to read the matter, and not take portions out of context. Gunnar Myrdal's whole book is

(6) against the argument.

Justice Frankfurter: That is a different point. I am merely going to the point that in these matters this Court takes judicial notice of accredited writings, and it does not have to call the writers as witnesses. How to inform the judicial mind, as you know, is one of the most complicated problems. It is better to have witnesses, but I did not know that we could not read the works of competent writers.

Mr. Marshall: Mr. Justice Frankfurter, I did not say that it was bad. I said that it would have been better if they had produced the witnesses so that we would have had an opportunity to cross-examine and test their conclusions.

For example, the authority of Hodding Carter, the particular article quoted, was a magazine article of a newspaperman answering another newspaperman, and I know of nothing further removed from scientific work than one newspaperman answering another.

I am not trying --

Justice Frankfurter: I am not going to take issue with you on that.

Mr. Marshall: No, sir. But it seems to me that in a case like this that the only way that South Carolina, under the test set forth in this case, can sustain that statute is to show that Negroes as Negroes -- all Negroes -- are different from everybody else.

Justice Frankfurter: Do you think it would make any dif-

23 ference to our problem if this record also contained the testimony of six professors from other institutions who gave contrary or qualifying testimony? Do you think we would be in a different situation?

Mr. Marshall: You would, sir, but I do not believe that there are any experts in the country who would so testify. And the body of law is that even the witnesses, for example, who testified in the next case coming up, the Virginia case, all of them, admitted that segregation in and of itself was harmful. They said that the relief would not to be break down segregation. But I know of no scientist that has made any study, whether he be anthropologist or sociologist, who does not admit that segregation harms the child.

Justice Frankfurter: Yes. But what the consequences of the proposed remedy are, is relevant to the problem.

Mr. Marshall: I think, sir, that the consequences of the removal of the remedy are a legislative and not a judicial argument, sir. I rely on Buchanan v. Warley, where this Court said that insofar as this is a tough problem, it was tough, but the solution was not to deprive people of their constitutional rights.

Justice Frankfurter: Then the testimony is irrelevant to the question.

Mr. Marshall: I think the testimony is relevant as to whether or not it is a valid classification. That is on the

classification point.

Justice Frankfurter: But the consequences of how you remedy a conceded wrong bear on the question of whether it is a fair classification.

Mr. Marshall: I do not know. But it seems to me that the only way that we as lawyers could argue before this Court, and the only way that this Court could take judicial notice of what would happen, would be that the Attorney General or some responsible individual officer of the State of South Carolina would come to this Court and say that they could not control their own state.

Justice Frankfurter: No, that is not what I have in mind. I want to know from you whether I am entitled to take into account, in finally striking this judgment, whether I am entitled to take into account the reservation that Dr. Graham and two others, I believe, made in their report to the President. May I take that into account?

Mr. Marshall: Yes, sir.

Justice Frankfurter: May I weigh that?

Mr. Marshall: Yes, sir.

Justice Frankfurter: Then you have competent consideration without any testimony.

Mr. Marshall: Yes, sir. But it is a policy matter. And that type of information, I do not believe, is more than persuasive when we consider constitutionally protected rights.

Justice Frankfurter: Of course, if it is written into the Constitution, then I do not care about the evidence. If it is in the Constitution, then all the testimony that you introduced is beside the point, in general.

Mr. Marshall: I think, sir, that so far as the decisions of this Court, this Court has repeatedly said that you cannot use race as a basis of classification.

Justice Frankfurter: Very well. If that is a settled constitutional doctrine, then I do not care what any associate or full professor in sociology tells me. If it is in the Constitution, I do not care about what they say. But the question is, is it in the Constitution?

Mr. Marshall: This Court has said just that on other occasions. They said it in the Fifth Amendment cases, and they also said it in some of the Fourteenth Amendment cases, going back to Mr. Justice Holmes in the first primary case in Nixon v. Herndon. And I also think -- I have no doubt in my mind -- that this Court has said that these rights are present, and if all of the people in the State of South Carolina and most of the Negroes still wanted segregated schools, I understand the decision of this Court to be that any individual Negro has a right, if it is a constitutional right, to assert it, and he has a right to relief at the time he asserts that right.

Justice Frankfurter: Certainly. Any single individual, just one, if his constitutional rights are interfered with, can

come to the bar of this Court and claim it.

Mr. Marshall: Yes, sir.

Justice Frankfurter: But what we are considering and what you are considering is a question that is here for the very first time.

Mr. Marshall: I agree, sir. And I think that the only issue is to consider as to whether or not that individual or small group, as we have here, of appellants, that their constitutionally protected rights have to be weighed over against what is considered to be the public policy of the State of South Carolina, and if what is considered to be the public policy of the State of South Carolina runs contrary to the rights of that individual, then the public policy of South Carolina, this Court, reluctantly or otherwise is obliged to say that this policy has run up against the Fourteenth Amendment, and for that reason his rights have to be affirmed.

But I for one think -- and the record shows, and there is some material cited in some of the amicus briefs in the Kansas case -- that all of these predictions of things that were going to happen, they have never happened. And I for one do not believe that the people in South Carolina or those southern states are lawless people.

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Every single time that this Court has ruled, they have obeyed it, and I for one believe that rank and file people in the South will support whatever decision in this case is handed down.

Justice Frankfurter: I have not heard that the bar of this case has suggested that South Carolina or Kansas will not obey whatever decree this Court hands down.

Mr. Marshall: There was only one witness, and he was corrected by Judge Parker. That was in this particular case. So it seems to me, and I in closing would like to emphasize to the Court, if I may, that this question, the ultimate question of segregation at the elementary and high school levels, has come to this Court through the logical procedure of case after case, going all the way back to the Gaines case, and coming up to the present time.

We had hoped that we had put in the evidence into the record, the type of evidence which we considered this Court to have considered in the Sweatt and McLaurin cases, to demonstrate that at the elementary and high school levels, the same resulting evil which was struck down in the Sweatt and McLaurin cases exists, for the same reason, at the elementary and high school levels, and I say at this moment that none of that has been disputed.

The only thing put up against it is a legislative argument which would ultimately relegate the Negro appellates in

this case to plead with the Legislature of South Carolina to do what they have never done in the past, to recognize their pleas.

We therefore respectfully urge that the judgment of the United States District Court be reversed.

Justice Reed: Is there anything in the record which shows the purpose of the passage of the legislation of South Carolina?

Mr. Marshall: No, sir. We did considerable research, and we had help on it. There is so much confusion and there are so many blank spots in between that we did not believe that it was in shape to give to anyone.

As a matter of fact, at that time there was a terrific objection to public education, one; and, two, an objection to the compulsory attendance laws.

So the three things got wound up together, the segregtion and those two points.

Justice Reed: Is it fair to assume that the legislation involving South Carolina, as these cases do, was passed for the purpose of avoiding racial friction?

Mr. Marshall: I think that the people who wrote on it would say that. You bear in mind in South Carolina -- I hate to mention it -- but that was right in the middle of the Klan period, and I cannot ignore that point. Considerable research in other States has shown that there were varying statements

made in the debates, some of which could be interpreted as just plain race prejudice. But I think that the arguments back and forth in South Carolina, at least, you could draw no conclusion from them.

But we do know, and the authorities cited in the Government's brief in the Henderson case, and, if you will remember, in the law professor's brief in the Sweatt case -- the authorities were collected to show that the effect of this has been to place upon the Negroes this badge of inferiority.

Justice Reed: In the Legislatures, I suppose there is a group of people, at least in the South, who would say that segregation in the schools was to avoid racial friction.

Mr. Marshall: Yes, sir. Until today, there is a good-sized body of public opinion that would say that, and I would say respectable public opinion.

Justice Reed: Even in that situation, assuming, then, that there is a disadvantage to the segregated group, the Negro group, does the Legislature have to weigh as between the disadvantage of the segregated group and the advantage of the maintenance of law and order?

Mr. Marshall: I think that the Legislature should, sir. But I think, considering the Legislatures, that we have to bear in mind that I know of no Negro legislator in any of these States, and I do not know whether they consider the Negro's side or not. It is just a fact. But I assume that

there are people who will say that it was and is necessary, and my answer to that is, even if the concession is made that it was necessary in 1895, it is not necessary now because people have grown up and understand each other.

They are fighting together and living together. For example, today they are working together in other places. As a result of the ruling of this Court, they are going together on the higher level. Just how far it goes -- I think when we predict what might happen, I know in the South where I spent most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be any trouble if they went to school together.

Justice Reed: I am not thinking of trouble. I am thinking of whether it is a problem of legislation or of the judiciary.

Mr. Marshall: I think, sir, that the ultimate authority for the asserted right by an individual in a minority group is in a body set aside to interpret our Constitution, which is our Court.

Justice Reed: Undoubtedly that passes on the litigation.

Mr. Marshall: Yes, sir.

Justice Reed: But where there are disadvantages and [illegible], to be weighed, I take it that it is a legislative

problem.

Mr. Marshall: In so far as the State is concerned, in so far as the majority of the people are concerned. But in so far as the minority --

Justice Reed: The States have the right to weigh the advantages and the disadvantages of segregation, and to require equality of employment, for instance?

Mr. Marshall: Yes, sir.

Justice Reed: I think that each State has been given that authority by decisions of this Court.

Mr. Marshall: And some State have, and others have not. I think that is the main point in this case, as to what is best for the majority of the people in the States. I have no doubt -- I think I am correct -- that that is a legislative policy for the State Legislature.

But the rights of the minorities, as has been our whole form of government, have been protected by our Constitution, and the ultimate authority for determining that is this Court. I think that is the real difference.

As to whether or not I, as an individual, am being deprived of my right is not legislative, but judicial.

The Chief Justice: Thank you.

Mr. Marshall: Thank you, sir.

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